

P. Jordan  
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Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** ICF Technology, Inc.--Reconsideration

**File:** B-239231.11

**Date:** April 4, 1991

Kenneth M. Bruntel, Esq., and Joan H. Moosally, Esq., Crowell & Moring, for the protester.  
William R. Medsger, Esq., and Robert W. Poor, Esq., Department of the Army, for the agency.  
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Second request for reconsideration of dismissal of protest as academic due to agency's corrective action is denied where protester fails to show that prior decision contained errors of fact or law, and information which protester alleged had not been previously considered was factually incorrect.

### DECISION

ICF Technology, Inc. requests reconsideration of our decision in Harding Lawson Assocs; ICF Technology, Inc.--Recon., B-239231.7; B-239231.8, Dec. 4, 1990, 90-2 CPD ¶ 450, denying its request for reconsideration of our August 7, 1990, decision to dismiss as academic the protest of Harding Lawson Associates (HLA) (B-231239.5). ICF alleges that our decision on reconsideration was based upon incorrect information.

We deny the request.

The request for proposals at issue, (RFP) No. DAAA15-90-R-0009, solicited proposals to provide various environmental services in support of the expanded environmental missions of the Army Toxic and Hazardous Materials Agency. Forty-two offerors submitted proposals, 24 of which, including ICF's, were found technically acceptable. Under the terms of the RFP, the agency could award up to 15 indefinite quantity/indefinite delivery (task order) contracts on a cost-plus-fixed-fee, completion-form basis. On March 30, 1990, the 15 offerors with the lowest evaluated costs received awards. ICF was not among the original awardees.

A number of protests followed the announcement of awards and debriefings of the unsuccessful offerors. On April 17, 1990, ICF filed a protest (B-239231.2), alleging various flaws in the evaluation process including a failure to properly evaluate and adjust ICF's costs. Throughout April and May, the agency conducted debriefings of those offerors in the competitive range which did not receive awards. As a result of questions raised regarding the cost realism evaluations, additional information was obtained from all 24 offerors in the competitive range to clarify various cost elements. After reevaluations, probable cost standings changed and ICF was determined to be among the 15 low offerors. Since it was in line to receive an award once the protests then pending were resolved, ICF withdrew its protest. As a further result of the change in standings, Environmental Resources Management, Inc. (ERM), one of the original awardees, had its contract terminated for the convenience of the government.

On June 15, the agency furnished our Office a written determination that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for our decision on the protests then pending. In accordance with the determination, contract performance on 14 of the contracts commenced upon issuance of an initial task order. ICF was not one of the 14 and was so informed.

On June 19 and 21, respectively, HLA and ERM filed protests challenging the evaluation process. From June 29 to July 6, the agency conducted a further review of the proposals. During this review, the contracting officer discovered an error in the adjustment to ICF's costs. Correction of this error placed ICF's costs above the 15 lowest offerors. ICF was not informed of the change in its position.

On August 7, 1990, the agency advised our Office that it intended to take corrective action to resolve the protests, including reopening negotiations with all 24 offerors in the competitive range; amending the RFP to eliminate the limit of 15 awards, and providing an opportunity to submit revised proposals and best and final offers (BAFOs). Pending the outcome of an evaluation of BAFOs, the agency intended to have the 14 original awardees continue performance. We then dismissed the protests of HLA and ERM as academic.

In its first request for reconsideration of the above dismissals, ICF argued that the agency's corrective action would not cure the agency's failure to perform a cost evaluation required by the solicitation and would not prevent below cost offers. It also complained that some offerors would have a competitive advantage due to pricing information

revealed during the protest process and performance of the contracts.

We found the agency's corrective action--amending the RFP to eliminate the particular cost evaluation it had omitted in the original evaluations, planning a comprehensive cost realism analysis to normalize below cost offers, and providing each offeror with a copy of all protests filed, including disclosed information--cured the matters raised by ICF and HLA and rendered the protests academic. See Maytag Aircraft Corp.--Recon.; Claim for Protest Costs, 69 Comp. Gen. 83 (1989), 89-2 CPD ¶ 457.

ICF also contended that it should have been allowed to perform pending the outcome of BAFO evaluations since ICF believed it was entitled to one of the 15 awards. However, from our review of the record we found that ICF was not entitled to an award. This aspect of our decision was based upon an exhibit entitled "Summary Cost Reevaluation Sheets for each technically acceptable offeror," which was provided to our Office for in camera review. Each sheet was comprised of typed cost figures with handwritten changes to various of those figures. While the typed figures resulted in ICF being the 13th lowest offeror, the handwritten changes resulted in a final figure which made ICF the 16th lowest offeror. In the context of the record, we concluded that the undated, handwritten changes represented a reevaluation conducted later in time.

As ICF was no longer an awardee, we found that ICF had suffered no prejudice from the continued contract performance of the 14 awardees. We also observed that where, as here, an agency had complied with the requirements of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (1988), we did not review an agency's determination to continue performance.

In its second request for reconsideration, ICF argues that the cost analysis from the reevaluation on which we relied was not the last such analysis. In support of its argument, ICF relies on a cost analysis furnished to it by the agency in conjunction with the reopening of discussions. This analysis sheet contains the same typed figures as the analysis on which we relied, but different handwritten changes to some of the figures. Because this analysis was identified as its "current" cost analysis, and would appear to place ICF among the low 15 offerors, ICF maintains that it was prejudiced by the agency's failure to allow it to perform contract work pending the outcome of BAFO evaluation. Since we did not consider this evidence before, ICF argues that we should reconsider our last decision.

The agency explains that the cost analysis on which ICF now relies was conducted in May, while the cost analysis on which we relied in our last decision was conducted between June 29 and July 6. No formal rankings have been prepared since that time. While the agency does not explain why its letter to ICF indicated that the May analysis represented the "current" analysis, we have no basis to conclude that the advice was anything but a mistake. Thus, we decline to accept ICF's contention that we should ignore the agency's explanation.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains either errors of fact or law or that the protester has information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1990). Since the information on which ICF relies is factually incorrect, we will not reconsider our prior decision.

Our conclusion is not changed by ICF's additional arguments that we should not rely on the cost analysis because it allegedly contains errors and because ICF was not advised of its changed status or provided an opportunity to respond to the errors. See Federal Acquisition Regulation §§ 15.1001, 1003 (1990). As we stated in our prior decision:

"This continued turnover in positions among offerors evidences the seriousness of the flaws in the cost realism analysis. Given the number of questions raised concerning the original and subsequent evaluations, and the various "debriefings" of and "clarifications" from the offerors, had we sustained HLA's or ERM's protest, we would have recommended relief similar to that proposed by the agency."

Harding Lawson Assocs; ICF Technology, Inc.--Recon., B-239231.7; B-239231.8, supra, 90-2 CPD ¶ 450 at p. 4. The possible presence of errors in the analysis, as well as ICF's changing status as an awardee, simply reinforces our conclusion that the agency correctly determined to take corrective action.1/



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1/ Any error in the agency's failure to promptly advise ICF of its status change, was merely procedural and does not affect the validity of the procurement. See Pauli & Griffin, B-234191, May 17, 1989, 89-1 CPD ¶ 473. This is especially true where, as here, the status change resulted from post-award, protest-related reevaluations, and where the agency ultimately decided to take corrective action through the

(continued...)

In this regard, while ICF's non-awardee status led us to the conclusion that it was not prejudiced by the continued performance of task orders by the 14 awardees, ICF's status as an awardee was irrelevant to our ultimate decision that, under the circumstances of this case, we would not review the agency's determination to commence and continue contract performance due to urgent and compelling circumstances.

The request for reconsideration is denied.

  
 James F. Hinchman  
General Counsel

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1/(...continued)  
reopening of discussions with all offerors, awardees and non-awardees, like ICF.